STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DONADIO, Minors.

UNPUBLISHED
February 20, 2014

No. 315111
Mecosta Circuit Court
Family Division
LC No. 11-005771-NA

In the Matter of DONADIO, Minors.

No. 315125
Mecosta Circuit Court
Family Division
LC No. 11-005771-NA

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from an order terminating their parental rights to their two children based on MCL 712A.19b(3)(b) (child suffered physical injury that parents failed to prevent), (c)(*i*) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (likelihood that the child will be harmed). We conditionally reverse to address a concern regarding compliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 through 1963, but otherwise affirm.

I. ICWA

In 25 USC 1912(a), Congress provided in pertinent part:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the

> Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. . . .

An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4). "Indian child's tribe" is defined as "(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts." 25 USC 1903(5). Enrollment is not always required for membership and when testimony suggests that a parent or child might qualify for membership, there must be compliance with notification requirements. *In re IEM*, 233 Mich App 438, 445-447; 592 NW2d 751 (1999), overruled on other grounds *In re Morris*, 491 Mich 81, 121; 815 NW2d 62 (2012). "[O]nly the Indian tribe can determine its membership." *In Re Morris*, 491 Mich at 100. In *In re Morris*, the Court held:

> Once sufficient indicia of Indian heritage are presented to give the court a reason to believe the child is or may be an Indian child, resolution of the child's and parent's tribal status requires notice to the tribe or, when the appropriate tribe cannot be determined, to the Secretary of the Interior. . . . [491 Mich at 108].

Moreover, the Court indicated that when a party informs the court that a child may be an Indian child, the court has "reason to believe" the child is an Indian Child, triggering the notice provisions. *Id.* at 105. Also, the Court notes that the notice provision is intended to protect the rights of the tribe, as well as the parent and child. *Id.* at 110.

Early in this case, respondents informed petitioner that they belonged to The Sault Tribe or the Blackfoot Tribe and consequently, notice was required in this case. The trial court ultimately held that the burden of establishing the applicability of the ICWA, including that the children were "Indian children," rested with respondents. However, once there was reason to believe that a child was an Indian child, the notice requirements could not be avoided by placing this burden on the parents.

We acknowledge that there was an effort to comply with the notice requirements. On October 14, 2011, petitioner sent a notification for each child, identifying the children's tribal affiliation as Sault Ste. Marie Tribe of Chippewa and/or Blackfoot, to respondents, the Sault Ste. Marie Tribe of Chippewa, and the Midwest Bureau of Indian Affairs in Fort Snelling, Minnesota. The notices state that they were sent by registered mail, return receipt requested. However, there is no return receipt in the record before us. Included with the notification was a family history identifying respondent mother as affiliated with but not a member of the Sault Tribe or Blackfoot, identifying the maternal grandfather as affiliated with but not a member of the Sault Tribe, and identifying his parents as Native American. On November 4, 2011, the Sault Ste. Marie Tribe of Chippewa Indians advised that it had determined that neither the children nor respondents were members or eligible for enrollment in the Tribe. On September 20, 2012, the Sault Ste. Marie Tribe of Chippewa Indians sent the same advisory in response to a subsequent inquiry that had apparently been made on September 7, 2012.

On or about October 25, 2011, the Midwest Regional Office of the United States Department of the Interior, Bureau of Indian Affairs, sent a letter advising that it had received a Notice of Child Custody Proceedings indicating possible Cherokee Indian ancestry. However, the Notice is not included in the record and it is not clear who made a claim of Cherokee ancestry. In any event, the Minnesota office advised that there were no Cherokee Tribes within the jurisdiction of that office and provided three addresses for Cherokee Tribes.[1] On October 27, 2011, fax sheets show that something was sent to the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians and the Cherokee Nation. There is no evidence of a mailing or a return receipt. A November 2, 2011, response from the Cherokee Nation in Oklahoma indicates that neither the children nor respondents nor other relations could be traced to the Cherokee Nation. On November 18, 2011, the Eastern Band of Cherokee Indians responded indicating that the children were not members or eligible to register as members of the Tribe. There is no evidence of a response from the United Keetoowah Band of Cherokee Indians.

On September 25, 2012, petitioner sent a notification for each child, identifying the children's tribal affiliation as Blackfeet Tribe, to respondents, the Blackfeet Tribe and the Bureau of Indian Affairs-Midwest Regional Office in Bloomington, Minnesota. A family history identifying the maternal grandfather as Blackfoot and his parents as Native American was included. There is no return receipt attached, but the notices state that they were sent by registered mail, return receipt requested. There is no evidence of a response to this notification.

25 CFR 23.11(a) and (c)(2) state that when the identity and location of the child's Indian parents or custodians or tribe is known, the parents, custodians and tribe must be notified and copies of the notices must be "sent to the Secretary and the appropriate Area Director," which for Michigan is "Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241."[2] When the identity or location of the Indian parents, custodians or tribe cannot be determined, 25 CFR 23.11(b) says that notice is to be sent to the

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[1] 25 CFR 23.11 requires that "[u]pon receipt of notice, the Secretary or his/her designee shall make reasonable documented efforts to locate and notify the child's tribe and the child's Indian parents or Indian custodians." Although this letter indicates that the Midwest Regional Office received a notice, it suggests that no such efforts were made.

[2] The Indian Child Welfare Act of 1978: A Court Resource Guide, State Court Administrative Office, July 2012, p 24, (SCAO Resource Guide), which is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/cws/ICWACResourceGuide.pdf (accessed December 4, 2013), indicates that the address for the Area Director of the Midwest Regional Office is 5600 American Boulevard West, Suite 500, Bloomington, MN 55437-1464. That this is the correct address of the Midwest Regional Office is verified at http://www.bia.gov/WhoWeAre/RegionalOffices/Midwest/index.htm. However, the letterhead of the October 25, 2011, letter from Midwest Regional Office of the United States Department of the Interior, Bureau of Indian Affairs, indicates that the office at that time was located in Ft. Snelling, Minnesota. It appears that the office is not located at 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.

appropriate Area Director. In *In re Morris*, 491 Mich at 103 n 14, the Court interprets the CFR as meaning that "when notice to the Secretary of the Interior is required under 25 USC 1912(a) for proceedings in Michigan, it is actually sent to the Minneapolis Area Director, Bureau of Indian Affairs."

Defendant argues that because the tribe was unknown, the United States Secretary of the Interior had to be notified under 25 USC 1912. In The Indian Child Welfare Act of 1978: A Court Resource Guide, State Court Administrative Office, July 2012, p 23, states that "[w]hen an Indian child may be eligible for membership in more than one federally recognized tribe, the court must notify all of those tribes about the child's pending case." It goes on to say that the state court must determine which tribe is the Indian child's tribe if the tribes cannot agree, and that "[i]f a court cannot identify a child's tribe, the court must send a notice of that fact to the U. S. Department of the Interior's regional Bureau of Indian Affairs director." *Id.* at p 24.

In the present case, the record is devoid of any return receipts showing that the tribes or the Director of the Midwest Regional Office received the notices. From the Regional Office's October 25, 2011, letter, it can be deduced that it was given notice with respect to possible Cherokee tribal affiliation, but there is nothing in the record to indicate that it received the notices pertaining to possible affiliation with the Sault Ste. Marie Tribe of Chippewa Indians or the Blackfoot Tribe. Moreover, from the response it can be deduced that the information required by 25 CFR 23.11(d), which includes the names of all tribes in which the children might be eligible for enrollment, was provided with whatever notification triggered the response regarding Cherokee tribal affiliation. Significantly, there is nothing in the record to establish that the Blackfoot Tribe ever received petitioner's notice or that it was ever contacted by the Bureau of Indian Affairs or that it made any determination regarding whether respondents and/or the children were members of the Tribe or eligible for membership. Similarly, the record is insufficient to determine whether there was reason to believe that the children might be United Keetoowah Band of Cherokee Indians Indian children, and if so, whether that tribe was ever notified. In *In re Morris*, 491 Mich at 113-114, the Court indicated that it was "essential that certain documents be included in the record," including the original or a copy of each notice sent as well as any return receipts and proof of service. The Court noted that without the return receipt, the trial court would not know whether the proper party received the notice or when time periods would begin to run, and without the notice it would not be able to tell if sufficient and accurate information was provided.

In re Morris, 491 Mich at 121, concluded that when it was unknown whether a child was an "Indian child" such that the ICWA would apply, the proper remedy would be to conditionally reverse. The ruling is reversed unless the ICWA does not apply, and if it is determined that the ICWA does apply, "then the foster care or termination proceedings are invalidated and the proceedings begin anew under ICWA's standards." *Id.* In the present case, it is possible that the requisite notices were sent and the return receipts were returned such that petitioner can establish that there was compliance with the notice requirements. If petitioner cannot do so, then the notices must be sent so that it can be determined consistent with the statute whether the children

are Indian children.[3] If they are not, the termination order can be reinstated. If they are, then new proceedings must be commenced. Although only respondent father raised this issue, we conditionally reverse as to both parties.

II. EFFORTS TO REUNIFY

Respondents next argue that, given their disabilities, the trial court did not make reasonable efforts to reunify the family. "Reasonable efforts to reunify the child and family must be made in all cases" except those involving aggravated circumstances not present in this case. MCL 712A.19a(2). Under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, a public agency must "make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services. Thus, the reunification services and programs provided by the [Department of Human Services (DHS)] must comply with the ADA." *In re Terry*, 240 Mich App 14, 25; 610 NW2d 563 (2000). However, ADA violations are not a defense to termination of parental rights proceedings because the "proceedings do not constitute 'services, programs or activities' within the meaning of" the ADA. Nonetheless," if the [DHS] fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id.* at 26. A trial court's finding of fact that reasonable efforts were made is reviewed for clear error. See *In re Mason*, 486 Mich 142, 152, 166; 782 NW2d 747 (2010).

Respondent mother's primary disability was mild to moderate mental retardation. She had full scale IQ of somewhere between 44 and 60. Respondent father had less severe cognitive limitations but suffered from mental illness and had undergone repeated and relatively frequent hospitalizations owing to suicidal ideation or psychosis.

At one point, the parties requested accommodations for their disabilities. A meeting was subsequently held at which numerous people, apparently including each respondent's case manager from Community Mental Health (CMH), were involved. The record indicates that a new parent agency treatment plan was prepared on August 3, 2012. It was not a simple, written plan and it is not clear that respondents would have understood the new agreement given their cognitive limitations. However, their foster-care worker indicated that she repeatedly attempted to meet with respondents to go over the treatment plan but was told they had been instructed not to do so by the father's attorney since he had not yet received the plan. The efforts to orally explain the requirements to respondents would have been a reasonable accommodation for this specific barrier.

[3] Although it was not effective at the time notices were initially required, it is noted that the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, has since been passed, effective January 2, 2013. It more broadly defines "Indian child" to include a child "[e]ligible for membership in an Indian tribe as determined by that Indian tribe," without reference to whether the parent is a member, MCL 712B.3(*l*), and also requires notice to the tribe or if the tribe cannot be determined, the Secretary of the Interior, MCL 712B.9(1).

Respondent mother argues that many more services could have been provided that would have accommodated her disabilities. Respondent father argues that he was not given the repetitive services that were called for given his cognitive disability, and that given his inability to use services he should have been given more concrete reasons for using services provided. However, it does not appear that more services would have addressed the parents' primary barrier, i.e., respondent mother's inability to overcome her own limitations so that she could parent the children and respondent father's failure to consistently implement the parenting information he was provided, as well as mental health concerns. Rachel Perkins, who was assigned to help one of the children but in this capacity was charged with redirecting the parents and teaching them how to parent, had been providing one-on-one coaching with parenting skills since February 2012. She noted that respondent father used parenting skills at some visits but was inconsistent. She noted concerns with respondent mother being open to redirection. Further, she noted that even after all the direction that had been given, two workers were needed at visitation to keep the children safe. She noted the repetition of skills over and over and the failure to meet any goals, and concluded that there was nothing more that could be done to help this family. Perkins's individualized parenting instruction was a reasonable accommodation for the parents' disabilities and yet, they were not able to sufficiently benefit from her instruction.

Perkins's instruction was not the only effort that was made at keeping this family together. Because of the parents' disabilities, petitioner started multiple services before respondents' oldest child was even born and maintained support after his birth and up to the time of termination. These early services included Prevention, Early On, Early Headstart, CMH, WIC and Maternal Infant Support, and Families Together Building Solutions. Each parent had a CMH case manager to identify services needed and coordinate their provision. Although more could arguably have been done, it does not appear that any more could have been done that would have resulted in the parents acquiring the necessary parenting skills to parent the children. Accordingly, the trial court did not clearly err in finding that reasonable efforts at reunification were made.

III. STATUTORY GROUNDS FOR TERMINATION

Respondents argue that statutory grounds for termination were not established by clear and convincing evidence. Only one statutory ground for termination need be established. *In re Olive/Metts*, 297 Mich App 35, 41; 823 NW2d 144 (2012). If parental rights are erroneously terminated based on one statutory ground but the court properly found that there was another statutory ground for termination, the error will be deemed harmless. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000). Whether a ground for termination has been proven by clear and convincing evidence is reviewed for clear error. *In re Mason*, 486 Mich at 152.

Here, parental rights were terminated based on MCL 712A.19b(3)(b)(*ii*), (c)(*i*), (g) and (j). Subsection (g) provides:

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

The court noted respondent mother's failure to supervise the infant, leaving her alone with the minor girl, resulting in injury. The court noted that the family "team" parenting model was in effect when the girl, as an infant, fell off the couch and that the more competent adults did not provide the necessary backup to protect the child. There was no clear error in the finding that the parents failed to provide proper care and custody.

Regarding future expectations, the court concluded that respondent mother's cognitive limitations impeded her ability to make appropriate decisions, that her poor judgment rendered her incapable of caring for small children, and that her emotional immaturity made her unreceptive to remedial services. The court noted Perkins's testimony regarding subsequent instances where the children were inadequately supervised. As for an incident when the minor boy wandered off, although a child slipping away might not be indicative of a concern for future injury by itself, respondent mother did not have the foresight to put the child in the stroller or hold his hand to prevent him from running, and respondent father left respondent mother alone with both children at a park when both were out of the stroller. This lapse provided some indicia that, despite the fall from the couch, respondent father did not appreciate the potential for injury when the children were left solely in respondent mother's care.

Moreover, the court found respondent father's failure to address his mental health needs significant. Respondent father takes issue with the focus on his mental health, but due to his frequent hospitalizations it was clear that he would not always be available to assist respondent mother. Also found to be significant were the lack of substantial progress despite intensive efforts and the parents' lack of insight into the reasons for removal and their lack of insight into their shortcomings as parents. Further, the trial court noted the children's developmental delays and that the parents showed no insight with regard to these limitations. The court further noted that respondents had no desire to change or benefit from services. Accordingly, the court found that this statutory ground was sufficiently established. We find no clear error.

Respondent father argues that the court is punishing him for seeking out mental health treatment as needed. However, the issue is not punishment but whether the repetitive treatment for suicidal ideation and problems with sustaining stability with regard to medication compliance would interfere with the ability to provide proper care and custody under the presenting circumstances.

Both parties argue that the grandparents' assistance was not taken into account and respondent mother argues that there was no showing that the grandparents could not care for all of the adults in the home plus the two children. However, there was testimony that the grandmother was not quick to give redirection and that, in any event, respondents ignored redirection from the grandparents. Thus, it is not clear that the children would have received proper care even with the grandparents present. Further, there was evidence that respondent mother herself often had to be de-escalated, and that the grandparents also cared for another adult son with severe cognitive deficits. While the grandparents may have managed, there was no clear error in the inference that two young children added to this mix would create an overwhelming situation.

Because we find that there was clear and convincing evidence to support the trial court's determination of no reasonable expectation of proper care and custody within a reasonable time,

we decline to address whether there was clear error with regard to the remaining bases for termination of parental rights. Coextensively, we decline to address whether § 19b(3)(b)(*i*) was unconstitutionally vague "in light of the facts of the case at hand." See *In re Gentry*, 142 Mich App 701, 705; 369 NW2d 889 (1985).

IV. BEST INTERESTS

Respondent mother argues that the trial court erred in determining that termination of parental rights was in the best interest of the children. Best-interest determinations are reviewed for clear error. *In re Olive/Metts*, 297 Mich App at 40.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In making the best-interest determination, a court may consider "the child's bond to his parent," "the parent's parenting ability," "the child's need for permanency, stability, and finality," and "the advantages of a foster home over the parents' home." *In re Olive/Metts*, 297 Mich App at 41-42. Additionally, mental health issues, *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001), and the child's safety and well-being, *In re VanDalen*, 293 Mich App 120, 142; 809 NW2d 412 (2011), may be considered. Moreover, while not required, a court may consider the best-interest factors set forth in MCL 722.23, a provision of the Child Custody Act, MCL 722.21 *et seq*. *In re JS & SM*, 231 Mich App 92, 102; 585 NW2d 326 (1998), overruled in part on other grounds, *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000), superseded, *In re Moss*.

The trial court relied on the custody and *Olive/Metts* factors. It found that the parents loved the children but the children showed little emotional attachment to respondent mother, who was detached and distracted, and expected the children to interact with her rather than taking the initiative to interact with them. Regarding capacity and disposition to meet the children's emotional and developmental needs, the court found respondent mother's emotional immaturity and cognitive deficits impeded her ability to prioritize the children's needs over her own, expecting them to meet her needs instead, and that she could not properly supervise and provide guidance. Further, acknowledging that respondent father could give love and affection when healthy, the court found his failure to address his mental health issues would make him frequently unavailable, and that his failure to acknowledge respondent mother's limitations put the children at risk. Noting that the minor boy would regress with language after visits with the parents, the court concluded that neither parent was meeting his developmental needs.

As for material needs and day-to-day care, the court noted that respondent mother was unable to provide routine care without assistance, but that respondent father could when attentive and healthy. The court concluded that neither parent appeared to recognize the children's special needs and would be unlikely to adequately care for them. The court found the pooled resources of the extended family would be sufficient to support the children, but that they were unable to prioritize needs and budget properly.

Regarding the parents' mental and physical health, the court again noted that respondent mother's cognitive and emotional limitations affected her ability to parent, that respondent father had untreated physical issues, and that respondent father's untreated mental illness indicated he would "inevitably decompensate" and be unable to parent. The court noted respondent mother's verbal and physical aggression but did not find domestic violence to be a significant factor. The court noted that the children were in a stable, satisfactory environment in a pre-adoptive foster home where they were bonded with the foster parents who were able to meet the children's developmental, emotional, and material needs; the court concluded that the children needed this safety, stability and continuity.

Regarding the permanence of the family unit, the court spoke of the yelling and chaotic environment with the extended family living in the proposed custodial home and mistakenly indicated that the sister's husband, who frequented the home, was a sex offender (it was one of respondent mother's brothers, who sometimes visited, who was a registered sex offender). Finally, the court did not view the grandparents as a desirable relative placement because it did not believe they could ensure the children's safety. The court noted their involvement with child protective services in the 1990s with substantiated neglect in 1995, the fact that they were not always effective as backups for the parents, the fact that they also cared for other challenged adults and were on disability, the concern that they did not enforce boundaries with respondent mother, and the way they handled an incident involving neglected dogs. Accordingly, the court found it would be in the best interests of the children to terminate the parents' parental rights.

Although the court mistakenly identified the extended family member who was a sexual offender, the court did an exhaustive analysis and thoughtfully considered all relevant factors when making its best-interests determination. Given the evidence in this case, there was no clear error in the best-interest determination.

Conditionally reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering